CHONG KON YON

v.

MBF FINANCE BERHAD

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO. C-02-827 OF 1995]
17 OCTOBER 1996

CONTRACT: *Claim for work done - Debtor a deposit-taking co-operative - Reconstruction exercise by Government - Debtor placed under receivership - Assets and liabilities transferred to defendant pursuant to an Order of the Central Bank - Liability - Whether defendant liable for debt.*

INTERPRETATION: *Construction of statutes - Purposive approach - Prime considerations - Intents of Parliament - Underlying policies - Language used.*

INTERPRETATION: *Construction of statutes - Section 31B Central Bank of Malaysia Ordinance 1958 - Paragraphs 3 & 4 Central Bank of Malaysia (Kewangan Usahasama Makmur Berhad) Order 1988 - Scope and effect - Reconstruction exercise of deposit-taking co-operatives - Intents of Parliament - Whether to protect the interest of depositors.*

WORDS & PHRASES: *"Subject to any agreement" - Central Bank of Malaysia (Kewangan Usahasama Makmur Berhad) Order 1988 para. 4.*

In 1986, 24 deposit-taking co-operatives (DTCS) in Malaysia, including Koperasi Serbaguna Gunung Emas (Gunung Emas), had suffered serious losses and were unable to meet their respective deposit liabilities. The Government, forced to interfere in the debacle, embarked upon certain remedial actions, including (i) amending the Central Bank of Malaysia Ordinance 1958 by adding thereinto s. 31B, to enable the Central Bank to make Orders in respect of the DTCS to protect the depositors' interest (ii) transferring the deposit liabilities and the accompanying assets of 21 of the DTCS, including those of Gunung Emas, to selected banks and financial institutions.

The Government's actions *inter alia* resulted in the coming into force, on 28 January 1988, of the Central Bank of Malaysia (Kewangan Usahasama Makmur Berhad Scheme) Order, 1988 (the 1988 Order) transferring, *inter alia,* the assets and liabilities of Gunung Emas to Kewangan Usahasama Makmur

Berhad (KUMB). The 1988 Order, *vide* its para 4(a), provided in effect that "any liabilities suffered by Gunung Emas or its Receiver shall, on and from the effective date, be suffered by KUMB...". This apart, para 4(c) stated in effect that "any existing contracts to which Gunung Emas or its Receiver were a party or parties shall have effect as if KUMB had been a party thereto instead of Gunung Emas or the Receiver". Both the provisions of paras. 4(a) and 4(c), however, were "subject to any agreement between Gunung Emas and KUMB".

As it transpired, on 30 January 1988, i.e. two days after the 1988 Order came into force, the Receiver of Gunung Emas and KUMB executed an agreement wherein it was provided, vide s. 4.04 thereof, that KUMB "shall not be liable for the debts and liabilities of the Co-operative and the Receiver in connection with the Co-operative's business or other activities ...".

It was not in dispute that Gunung Emas, upon its receivership, was indebted to the appellant pursuant to a contract it had executed with the appellant. The facts also showed that the assets, together with the transferred liabilities of Gunung Emas had subsequently been transferred to MBF Finance Berhad (MBF), the respondent herein. The appellant sought to enforce recovery of the debt against MBF, and in the Court below filed a liquidated claim against the latter. The learned Judge ruled that on the facts, and on the construction of the 1988 Order and the agreement of 30 January 1988, MBF was not liable for the debt, and the appellant hence appealed.

Before the learned Court of Appeal Judges, the appellant argued that s. 4.04 of the agreement of 30 January 1988 had no effect because (i) all the assets and liabilities of Gunung Emas had been transferred to KUMB and then to MBF on the coming into force of the 1988 Order on 28 January 1988 (ii) the words "subject to any agreement" in the 1988 Order did not apply to the agreement of 30 January 1988 as it referred only to existing agreement at the time of the Order. It was contended on these premises that KUMB, and therefore MBF, could not contract themselves out of liability and that the agreement of 30 January 1988 could not be said to have taken away the rights of the appellant to claim payment of the liabilities as vested and transferred by the Order.

Held:

Per Abdul Malek Ahmad JCA (delivering the judgment of the Court):

[1] The learned Judge was right in concluding the way he did. Clearly, the respondent cannot be held to be liable for the purported debt of Gunung Emas to the appellant.

[2] Having regard to the fact that the 1988 Order does not expressly or implicitly prohibit the entering into an agreement after 28 January 1988, the assumption that an agreement between KUMB and the appellant could be made before, on or after the date of coming into force of the said Order is a perfectly valid presumption.

[3] The 1988 Order was made to protect the interest of the depositors, i.e. those who put in deposits with the deposit-takers, and not so much of those who had a contractual relationship with the deposit-takers in respect of other business undertakings where liabilities had arisen. The language used and the scheme laid out in s. 31B of the Ordinance clearly underlined Parliament's concern for protecting the interests of depositors in the deposit-takers and the reason why it was expedient to give power to the Central Bank to make such an Order as the one that was made.

[4] It ought also to be noted that in para 3 of the 1988 Order, specific mention was not made of "liabilities" but of "deposit liabilities" of the deposit-takers and of "deposits" of the depositors in the deposit-taker. The intent was clear that the Order was to secure the interest of the depositors in regard to the corresponding deposit liabilities of the deposit-takers. This is made clear in the mandatory language used in sub-para (2) of the provision that KUMB "shall repay" the repayable deposits partly in cash and partly in shares. As for para 4 thereof, although it is concerned not with deposit liabilities but with other liabilities and properties of the deposit-takers, the language used does not impose mandatory obligations.

[5] The learned Judge was right in his view that the words "subject to any agreement between the specified deposit-taker and KUMB..." in para 4 of the 1988 Order could only have reference to agreements entered into before the coming into effect of the Order. Clearly, if the provisions of para 4 of the 1988 Order had to be applied to all the agreements made after the effective date, the Order would have explicitly stated so. Thus, clause 4.04 of the agreement between Gunung Emas and KUMB excluding liabilities spelt out therein is valid.

[Appeal dismissed]

KONTRAK: *Tuntutan bagi kerja yang telah dilakukan - Penghutang merupakan koperasi penerima deposit - Penyusunan semula oleh Kerajaan - Penghutang diletak di bawah penerimaan - Aset dan tanggungan dipindahmilik kepada defendan berikutan satu Perintah Bank Pusat - Tanggungan - Samada defendan bertanggungan bagi hutang.*

PENTAFSIRAN: *Pentafsiran statut - Pendekatan yang berdasarkan maksud - Pertimbangan-pertimbangan utama - Maksud Parlimen - Dasar-dasar yang terlindung - Bahasa yang digunakan.*

a ***PENTAFSIRAN:*** *Pentafsiran statut - Seksyen 31B Ordinan Bank Pusat Malaysia 1958 - Perenggan-perenggan 3 & 4 Perintah Bank Pusat Malaysia (Kewangan Usahasama Makmur Berhad) 1988 - Skop dan kesan - Penyusunan semula koperasi-koperasi penerima deposit - Tujuan Parlimen - Samada untuk melindungi kepentingan pendeposit.*

b ***PERKATAAN & ISTILAH:*** *"Tertakluk kepada mana-mana perjanjian" - Aturan Bank Pusat Malaysia (Kewangan Usahasama Makmur Berhad) 1988 perenggan 4.*

Dalam tahun 1986, 24 koperasi penerima deposit (DTCS) di Malaysia, termasuk
c Koperasi Serbaguna Gunung Emas (Gunung Emas), telah mengalami kerugian yang serius dan tidak dapat memenuhi tanggungan-tanggungan deposit mereka masing-masingnya. Kerajaan yang terpaksa campur-tangan di dalam bencana itu, telah memulakan sesuatu tindakan pemulihan, termasuk (i) meminda Ordinan Bank Pusat Malaysia 1958 dengan memasukkan ke dalamnya s. 31B, bagi
d membolehkan Bank Pusat membuat aturan-aturan berhubung dengan DTCS tersebut untuk melindungi kepentingan pendeposit-pendeposit (ii) memindah-milik tanggungan-tanggungan deposit dan aset-aset yang mengiringi di 21 buah DTCS, termasuk kepunyaan Gunung Emas, kepada bank-bank dan institusi-institusi kewangan yang terpilih.

e Tindakan kerajaan ini, antara lainnya telah menyebabkan berkuatkuasanya Perintah Bank Pusat Malaysia (Sekim Kewangan Usahasama Makmur Berhad) 1988 (Perintah 1988) pada 28 Januari 1988 yang memindahkan antara lainnya aset-aset dan tanggungan-tanggungan Gunung Emas kepada Kewangan Usahasama Makmur Bersatu (KUMB). Perintah 1988, melalui perenggan
f (4a)nya, memperuntukkan secara berkesannya bahawa "apa-apa tanggungan yang dialami oleh Gunung Emas atau Penerimanya akan, pada dan daripada tarikh penguatkuasaan, dialami oleh KUMB". Selain itu, perenggan 4(c) menyatakan secara berkesannya bahawa "mana-mana kontrak yang wujud kepada mana Gunung Emas atau Penerimanya adalah merupakan satu pihak
g atau pihak-pihak, akan mempunyai kesan seolah-olah KUMB telah menjadi satu pihak kepadanya dan bukannya Gunung Emas atau Penerima tersebut". Kedua-dua peruntukan 4(a) dan 4(c), walaubagaimanapun, adalah "tertakluk kepada mana-mana perjanjian antara Gunung Emas dan KUMB".

Sepertimana yang berlaku, pada 30 Januari 1988, iaitu dua hari selepas Perintah
h 1988 berkuatkuasa, Penerima Gunung Emas dan KUMB telah menyempurnakan satu perjanjian di dalam mana telah diperuntukan, melalui s. 4.04 di situ, bahawa KUMB "tidak akan menjadi bertanggungan bagi hutang-hutang dan tanggungan-tanggungan Koperasi dan Penerima berhubung dengan perniagaan atau aktiviti-aktiviti lain Koperasi ...".

i

Adalah tidak dipertikaikan bahawa Gunung Emas, sewaktu diletak di bawah penerimaan, telah terhutang kepada perayu di bawah satu kontrak yang telah dimasukinya dengan perayu. Fakta-fakta juga menunjukkan bahawa aset-aset, bersama-sama dengan tanggungan-tanggungan Gunung Emas yang telah dipindahmilik, telah kemudiannya dipindahkan kepada MBF Finance Berhad (MBF), iaitu responden di sini. Perayu cuba mendapatkan semula hutang berkenaan daripada MBF, dan dalam Mahkamah dibawah, telah memfailkan suatu tuntutan jumlah tertentu terhadap pihak yang terkemudian. Hakim yang bijaksana memutuskan bahawa berdasarkan fakta, dan di atas pentafsiran Perintah 1988 serta perjanjian bertarikh 30 Januari 1988, MBF adalah tidak bertanggungan bagi hutang tersebut, dan perayu dengan itu telah merayu.

Di hadapan Hakim-Hakim Mahkamah Rayuan yang bijaksana, perayu berhujah bahawa s. 4.04 perjanjian bertarikh 30 Januari 1988 tidak mempunyai apa-apa kesan kerana (i) kesemua aset-aset dan tanggungan Gunung Emas telah dipindahkan kepada KUMB dan kemudiannya kepada MBF dengan berkuatkuasanya Perintah 1988 pada 28 Januari 1988 (ii) perkataan-perkataan "tertakluk kepada mana-mana perjanjian" dalam Perintah 1988 tidak terpakai pada perjanjian bertarikh 30 Januari 1988 kerana ungkapan tersebut hanya merujuk kepada perjanjian yang sudah wujud pada waktu Perintah itu dikuatkuasakan. Berdasarkan kesimpulan ini, ianya ditegaskan bahawa KUMB, dan dengan itu MBF, tidak boleh melepaskan diri mereka daripada tanggungan dan bahawa perjanjian bertarikh 30 Januari 1988 itu tidak boleh dikatakan sebagai telah menghapuskan hak-hak perayu untuk menuntut pembayaran tanggungan-tanggungan sepertimana yang diletakhak dan dipindahkan menurut Perintah 1988 tersebut.

Diputuskan:

Oleh Abdul Malek Ahmad HMR (menyampaikan penghakiman Mahkamah):

[1] Hakim yang bijaksana adalah betul dalam memutuskan sepertimana yang telah dilakukan olehnya. Adalah jelas bahawa responden tidak boleh dikatakan sebagai bertanggungan bagi hutang Gunung Emas kepada perayu.

[2] Memandangkan fakta bahawa Perintah 1988 tidak dengan nyatanya atau secara tersirat melarang pemeteraian sesuatu perjanjian selepas 28 Januari 1988, maka tanggapan bahawa suatu perjanjian antara KUMB dan perayu boleh dibuat sebelum, pada atau sesudah tarikh penguatkuasaan Perintah tersebut adalah sesungguhnya suatu tanggungan yang sah dan baik.

[3] Perintah 1988 telah dibuat untuk melindungi kepentingan pendeposit-pendeposit, iaitu mereka yang mendeposit dengan penerima-penerima deposit tersebut, dan bukan sangat ditujukan kepada mereka-mereka yang

mempunyai perhubungan kontraktual dengan penerima-penerima deposit berhubung dengan akujanji-akujanji perniagaan yang lain di mana tanggungan-tanggungan telah berbangkit. Bahasa yang digunakan dan sekim yang dibentangkan dalam s. 31B Ordinan tersebut dengan jelasnya membentangkan keprihatinan Parlimen bagi melindungi kepentingan pendeposit-pendeposit dalam penerima-penerima deposit, dan mengapa ianya wajar untuk memberikan kuasa kepada Bank Pusat untuk membuat Perintah sepertimana yang telah dibuatnya.

[4] Harus juga diambil perhatian bahawa dalam perenggan 3 Perintah 1988, sebutan yang spesifik tidak dibuat berhubung dengan "tanggungan", tetapi sebaliknya dibuat berhubung dengan "tanggungan-tanggungan deposit" penerima-penerima deposit tersebut dan "deposit-deposit" pendeposit-pendeposit dalam penerima deposit tersebut. Maksudnya adalah jelas bahawa Perintah tersebut adalah untuk menjamin kepentingan pendeposit-pendeposit sepadan dengan tanggungan-tanggungan deposit penerima-penerima deposit tersebut. Ini telah dijelaskan dalam bahasa mandatori yang digunakan dalam perenggan kecil (2) peruntukan tersebut bahawa KUMB "akan membayar-balik" deposit-deposit yang boleh dibayar-balik sebahagiannya dalam bentuk tunai dan sebahagian lagi dalam bentuk saham. Berhubung dengan perenggan 4 pula, walaupun ianya tidak berkaitan dengan tanggungan-tanggungan deposit, dan malahan berkaitan dengan tanggungan dan hartanah-hartanah lain penerima deposit tersebut, bahasa yang digunakan tidak mengenakan kewajipan-kewajipan mandatori.

[5] Hakim yang bijaksana adalah betul dalam pendapatnya bahawa perkataan "tertakluk kepada mana-mana perjanjian antara penerima deposit yang berkenaan dengan KUMB" dalam perenggan 4 Perintah 1988 hanya mempunyai rujukan kepada perjanjian-perjanjian yang telah dimasuki sebelum berkuatkuasanya Perintah tersebut. Jelas, jika peruntukan-peruntukan perenggan 4 Perintah 1988 tersebut terpakai juga kepada kesemua perjanjian yang dibuat selepas tarikh penguatkuasaan, Perintah tersebut seharusnya menyatakan sedemikian dengan jelasnya. Dengan itu, fasal 4.04 perjanjian antara Gunung Emas dan KUMB yang mengenepikan tanggungan-tanggungan yang dibentangkan di dalamnya itu adalah sah.

[Rayuan ditolak]

Cases referred to:

Allen v. Thorn Electrical Industries Ltd ***(refd)***.

Griffin v. Metropolitan Police District Receiver [1968] 1 QB 487 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn. Bhd. [1994] 4 CLJ 285; [1994] 3 AMR 41 2103 ***(refd)***

Legislation referred to:
Central Bank of Malaysia Ordinance, s. 31B
Central Bank of Malaysia (Kewangan Usahasama Makmur Berhad Scheme) Order, 1988
Prices and Incomes Act 1966 (U.K.), ss. 28(2) and 29(4)

For the appellant - Lim Kian Long (Lim Sung Yin with him); M/s Lim Kian Leong & Co.
For the respondent - Ranjit singh; M/s. Cheang & Ariff.

JUDGMENT

Abdul Malek Ahmad J:

The question that arises here is whether the respondent, who was the third defendant in the proceedings below, can be held liable for the debt of the first defendant Koperasi Serbaguna Gunung Emas Berhad. The appellant, who is a building contractor, had entered into a contract with the first defendant but before payment was made, the first defendant was placed under receivership.

On 28 January 1988, the Central Bank of Malaysia (Kewangan Usahasama Makmur Berhad Scheme) O. 1988 (hereinafter "the order") was published as P.U. (A) 9/1988 transferring the assets and some of the liabilities of the first defendant to the second defendant Kewangan Usahasama Makmur Berhad. The assets together with the transferred liabilities were subsequently transferred from the second defendant to the respondent.

The relevant parts of the order are sub-paras. (a) and (c) of para. 4 which read as follows:

> 4. Subject to any agreement between the specified deposit-taker and Kewangan Usahasama Makmur Bhd. the following shall be deemed to be operative on the date of the coming into effect of this Order:
>
> (a) any properties vested in or held by the specified deposit-takers, or their receivers, either alone or jointly with any other person, or any liabilities suffered by the specified deposit-takers or their receivers, either alone or jointly with any other person, shall, on and from the effective date be vested in or held by or be suffered by Kewangan Usahasama Makmur Bhd. either alone or jointly with such other person, as the case may be;
>
> (b) ...;
>
> (c) any existing contracts to which the specified deposit-takers or their receivers were parties, whether in writing or not, shall have effect, on and from the effective date, as if Kewangan Usahasama Makmur Bhd. had been a party thereto instead of the specified deposit-takers or their receivers;
>
> (d) ...;

(e) ...;

(f) ...;

(g) ...;

(h) ...;

(i) ...;

The relevant agreement on 30 January 1988 between the Receivers of the first defendant and the second defendant states at s. 4.04 as follows:

> Section 4.04 **Purchaser not liable for Co-operative's debts**
>
> Save and except for those debts and liabilities taken over by the purchaser under this agreement, the purchaser shall not be in any manner liable for the debts and liabilities of the Co-operative and the receivers in connection with the Co-operative's business or other activities.
>
> Provided always that all operational costs and expenses incurred by the receivers up to January 30, 1988 shall be for the account of the receivers and thereafter these costs and expenses shall be incurred by the receivers as the purchaser's agent and the Receivers shall be reimbursed by the purchaser accordingly."

Learned Counsel for the appellant had argued that as at 28 January 1988, the liabilities of the first defendant had already been transferred to the second defendant and the words "subject to any agreement" in the order cannot include an agreement made subsequently which in this case was two days later. He stressed that contracting out of liability must be before the order is published.

He had referred to *Allen v. Thorn Electrical Industries Ltd.; Griffin v. Metropolitan Police District Receiver* [1968] 1 QB 487 where the defendant employers had agreed with the plaintiffs' representative that the plaintiffs, their employees should receive wage increases as from l April and 31 August 1966 respectively. Before any increased wages had actually been paid, the Prices and Incomes Act 1966, which was designed, *inter alia*, to enforce a temporary standstill in terms of employment, was passed. On claims by the plaintiffs for the increase in wages due under the agreements, the defendants contended that they could not lawfully pay such increased remuneration by reason of the effect of ss. 28(2) and 29(4) of the said Act respectively as applied to the plaintiffs respective remuneration by article 2 of the Temporary Restrictions on Pay Increases (No. 2) Order 1966 and article 2 of the Temporary Restrictions on Pay Increases (July 20, 1966 Levels) (No. 1) Order 1966. Those Orders brought the sections into effect on 20 July 1966, in the case of the remuneration of one plaintiff, and on 24 November 1966 in the case of the other plaintiff; and no increase in wages had actually been paid by the defendants before those dates.

On appeals by the respective plaintiffs against decisions of Country Court Judges dismissing their claims, it was held that, in allowing the appeals, that the words "the rate of remuneration paid" in ss. 28(2) and 29(4) of the relevant Act meant "the rate of remuneration contracted, to be paid" and not the amount actually paid before the prescribed dates when the Act came into operation as regards the plaintiffs' remuneration; and that, accordingly, since the plaintiffs were contractually entitled to the increased rates of remuneration before the prescribed dates, their claims succeeded.

Per curiam it was said that the word **"paid"** must be construed in the context in which it appears in order to discover the appropriate meaning and existing legal rights are not to be taken away on an ambiguity in a statute; nor is a citizen to be penalised on an ambiguity.

Lord Denning, M.R. had stated at p. 502:

> Taken literally, the word "paid" does mean actually paid in cash. It means the money which the man receives in his pay packet. That is how we were invited to construe it here. The draftsman of this Act was, it was suggested, a learned pedant who used words with meticulous accuracy. I decline to accept this invitation. We are not the slaves of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them. The context here is "the rate of remuneration paid."

At pp. 503 and 504, he said:

> In my opinion, therefore, in these sections the words, "the rate of remuneration paid for the same kind of work" before a particular date, mean "the rate of remuneration contracted to be paid for the same kind of work done" before that date. If I were wrong in this view, I am clear that, at any rate, the requirement in the statute is ambiguous and uncertain: in which case the rights under the contract must prevail. No man's contractual rights are to be taken away on an ambiguity in a statute: nor is an employer to be penalised on an ambiguity.
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> Mr. Allen and Mr. Griffin were both entitled by contract to an increase in their wages before the prescribed date, that is, before July 20 in Mr. Allen's case and November 24 in Mr. Griffin's case. Their rate of remuneration was, I think, determined by the increased rate contracted to be paid for work done before that date; and not by the sum actually paid. The employers must keep to their contract and pay the increased rates. The statute by clear words could have required them to break their contract but the words are not sufficiently clear for the purpose.
>
> I would allow both appeals.

At p. 505, Danckwerts LJ said:

> These statutory provisions are penal and are designed to interfere with rights of contract and the pre-existing legal position of free citizens of this country. Well-established principles, therefore, apply to the situation. Existing legal rights are not to be taken away except by clear words in the statute. If two constructions are possible, the construction which produces unreason and hardship is to be avoided, and the construction which interferes with the legal rights of the subject to a lesser estent and produces the less hardship is to be preferred."

Then, at pp. 508 and 509, Winn L.J. said:

> One last opinion I express which has more general application than to these two appeals, and that is that I must reject as quite untenable any submission, such as I understood Mr. Owen to make, that if in any case one finds (a) that a statute is worded ambiguously in any particular respect, and (b) finds also clear indications aliunde that Parliament intended that they should have the strictest and most stringent meaning possible, the Court is therefore compelled to construe the section in the sense in which Parliament would have desired it to take effect, by giving the words their most stringent possible meaning. On the contrary, I think the right view is, and as I understand it always has been, that in such a case of ambiguity, it is resolved in such a way as to make the statute less onerous for the general public and so as to cause less interference, than the more stringent sense would with such rights and liberties as existing contractual obligations.
>
> I think both these appeals should be allowed.

Learned Counsel for the respondent had told the Court that in the eighties, there was mismanagement of twenty four deposit-taking Co-operatives and the Government had come up with a White-Paper. He referred to paras. 4, 43 and 47 of the said White Paper which are restated below:

> 4. On the whole, the DTCs were grossly under-capitalised, having borrowed high interest short-term deposits to finance long-term investments which yielded insufficient or no income to service the debt. A significant number of Co-operatives also suffered from bad management, either due to lack of expertise or professionalism or through imprudent, and in some cases, corrupt management. This resulted in gross mismanagement of funds, such as over-investment in land and property, with nearly one-fifth of assets in housing development projects and fixed assets, some of which were purchased at the height of the property market.
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> 43. The financial position of the 24 DTCs investigated may be summarized as follows:
>
> (1) The Co-operatives are badly managed. Not only did many DTC management over-invest the assets of their DTC in land and shares, there were numerous instances of fraud, negligence, conflict of interest and possible criminal breach of trust. The authorities are currently investigating 6 cases of possible fradulent conduct and 13 cases of conflict of interest

(2) The DTCs are illiquid. As at August 8 1986 they had only cash and fixed deposits of $97.9 million. Most of which were pledged against bank loans of $51.9 million. Most of their assets were tied up in property and shares which are subject to large losses if liquidated under conditions of forced sale.

(3) Many of the DTCs are insolvent. 21 out of the 24 DTCs have negative capital, after adjusting for losses. Altogether, the DTCs have negative capital of $600.8 million, which therefore lead to losses for the depositors. To place the DTCs into a viable position, their capital must be increased.

(4) Many DTCs have problems of long-term viability. Because too much assets are funded from short-term deposits and are tied in projects with long gestation periods, the income from their investments are not sufficient to meet their interest payments. On pure commercial grounds, the accountants recommended that 11 out of 24 DTCs be placed in liquidation, since they cannot earn sufficient cash flow to meet their interest payments and overheads. Any solution must comprise an element to reduce their interest costs on loans and deposits.

(5) The Co-operatives need time to rehabilitate or realise their assets in an orderly manner to meet their deposit liabilities. With proper management, tight supervision and a viable financial structure (which is likely to require a portion of deposits to be capitalised), the DTCs may be able to reduce the net losses to the depositors.

(6) The depositors need some liquidity immediately. Any solution must take into consideration funding to meet the need for liquidity by the depositors.

(7) Many DTCs had contravened the rules and regulations, 14 out of 24 DTCs did not have borrowing powers granted by JPK. 7 out of the 10 DTCs which had borrowing powers exceeded their limits. Only 3 had kept within their borrowing limits. Numerous DTCs did not adhere to the minimum liquidity ratios required by the authorities. Many investments and loans were made against the specific disapproval of JPK or without approval.

47. After taking into the views of the ACC and submissions by the depositors and the DTC management, the Government has decided on three lines of action as follows:

(1) **Liquidation**. Due to the large losses sustained by two DTCs, which had also suffered from gross mismanagement, both KOSATU and SAKAPP, each with a net asset backing per $1 of deposit estimated at 30 sen and 37 sen respectively, should be placed in liquidation. Receivers for these two DTCs would be appointed to recover whatever assets are available for distribution to the depositors. Some liquidity loans will be made available to the Receiver to pay some funds back to the depositors, depending on the net assets available for distribution.

(2) **Voluntary unfreezing**. In view of the special circumstances surrounding KSM, which had suffered large losses (as yet unrealized) due to the sharp fall in the price of its investments in shares, leading to a net asset backing of 41 sen per $1 of deposit, the DTC would be unfrozen pending a decision from the management and its members on its appropriate course of action. The Co-operative could, if their members so wish and if they are able to negotiate satisfactory terms with the banks and finance companies, join the third course of action.

(3) **Transfer the deposit liabilities and the accompanying assets to strong banks and finance companies**. For the other 21 DTCs, the banks and finance companies have **agreed in principle and in the national interest** to assume the deposit liabilities of these DTCs at the net asset value of each DTC, subject to mutual agreement on the terms and conditions of exchange and the depositors and members of the DTCs agreeing to the restructure scheme. The depositors will have to agree to some restructure of their terms of deposit, including interest at not more than 6%p.a. for an extended time period, depending on the quality of assets of the DTC concerned.

Learned Counsel had reiterated that the scheme was started in January 1988 by the Central Bank when they amended the Central Bank of Malaysia Ordinance 1958 by adding s. 31B where, among other things, provision is made for the Central Bank to make an order in respect of a deposit-taker to protect the interest of its depositors by making an order, with the concurrence of the Minister, published in the Gazette to provide for the Central Bank to purchase shares in a licenced finance company, to make advances to a licenced finance company for their utilisation solely to acquire the property and liabilities of the deposit-taker or the interests of its depositors or to make advances of its funds to a bank solely to acquire a licenced finance company which shall acquire the property and liabilities of the deposit taker or the interests of its depositors.

To give effect to these provisions, the Central Bank may authorise the licenced finance company to undertake a reconstruction exercise, purchase and acquire the property and liabilities of the deposit-taker and the interest of its depositors, enter into such arrangement, agreement or transaction with the deposit-taker or its depositors as may be necessary, expedient or desirable or do such other act or thing to ensure the successful implementation of the order.

Reverting to the proceedings in the Court below, the appellant had sued the respondent on a liquidated claim and on an application for summary judgment being filed, the Court had ordered the following preliminary issue to be tried and that is whether the respondent on the facts of the case and on the construction of the order and the agreement dated 30 January 1988 between the receiver of the first defendant and the second defendant, can be held liable for the purported debt of the first defendant to the appellant as prayed in the writ and statement of claim.

The background facts had been adequately stated by the learned trial Judge K.C. Vohrah J as follows:

> In 1986 the country experienced a serious problem relating to deposit-taking Co-operatives (DTCs) which started with the heavy withdrawals on deposits with Koperasi Belia Bersatu Bhd. and its inability to meet the deposit liabilities.
>
> The Government of Malaysia promulgated the Essential (Protection of Depositors) Regs. 1986 on July 23, 1986 and empowered Bank Negara Malaysia to freeze the assets of Koperasi Belia Bersatu Bhd. and its key management, and to investigate into the affairs of the Co-operative.
>
> Following heavy withdrawals on the deposits of other DTCs and at the request of the boards of directors of several large DTCs , the Government froze the assets of 23 other DTCs on August 8, 1986 under the Essential Regulations and appointed 17 firms of accountants to assist Bank Negara Malaysia in its investigations. (See Lampiran kepada Kertas Perintah 50 Tahun 1986-Investigation Report on Twenty-Four Deposit-Taking Cooperatives, p. 21, para. 2).
>
> Among the 24 DTCs investigated was the lst defendant. The Government proposed the taking of 2 courses of action in respect of 3 DTCs and another course of action against the other 21 DTCs which included the lst defendant, this latter course being this
>
> > **(3) Transfer the deposit liabilities and the accompanying assets to strong banks and finance companies.**
> >
> > For the other 21 DTCs, the banks or finance companies have agreed in principle and in the national interest to assume the deposit liabilities of these DTC's at the net asset value of each DTC, subject to the mutual agreement on the terms and conditions of exchange and the depositors and members of the DTC's agreeing to the restructure scheme. The depositors will have to agree to some restructure of their terms of deposit, including interest at not more than 6%p.a. for an extended time period, depending on the quality of assets of the DTC concerned.
> >
> > (See p. 33 of Report).

The appellant contends that s. 4.04 of the agreement, between the first defendant and the second defendant has no effect because all the assets and liabilities of the first defendant were vested in and transferred to the second defendant and then to the appellant on the coming into force of the order in view of para. 4 thereof. Consequently, the agreement two days later cannot be said to have taken away the rights of the appellant to claim payment of the liabilities vested and transferred by the order. The opening words of the relevant paragraphs must refer to an existing agreement at the time of the order and in the Court below, learned Counsel for the appellant had cited *Chor*

Phaik Har v. Farlim Properties Sdn. Bhd. [1994] 4 CLJ 285; [1994] 3 AMR 41 2103 where the view was expressed that the Court would not follow a construction of a statute that would cause great hardship to the general public where another interpretation is available. Applying that principle to the present case, to accede to the respondent's argument that "subject to any agreement" would include an agreement entered into after the coming into force of the order would cause great hardship and injustice in that it would take away vested rights from innocent parties where the only remedy would be against first defendant which had already become an empty shell, whose assets have been transferred to the second defendant and then to the respondent.

As far as learned Counsel for the respondent is concerned, the words "subject to any agreement" is grammatically capable of one meaning only and that is to cover all agreements on whatever date they were entered into whether before or after the order came into effect and this is emphasised by the word "any". In addition, para. 3 of the order had clearly stipulated that only deposit liabilities were to be assumed by the second defendant.

The learned trial Judge had gone on to say:

> Before I go further let me point out that the arguments of both parties have gone on the assumption that an agreement between Kewangan Usahasama Makmur Bhd. (the 2nd defendant) and any of the deposit-takers appearing in the Schedule to the Order can be made before on or after the date of coming into force of the said order. The assumption is a perfectly valid one having regard to fact that the said Order does not expressly or implicitly prohibit the entering into an agreement after 28.1.1988.
>
> I now come to the arguments put forward by the parties. I agree with the conclusion of the 3rd. defendant but for different reasons. My view is that the clear tenor of s. 31B of the Act and of the said order is that the Order was made to protect the interest of the depositors, those who put in deposits with the deposit-takers not so much others who had a contractual relationship with the deposit-takers in respect of the other business undertakings where liabilities had arisen. The language used in and the scheme laid out in s. 31B of the Ordinance, clearly underline Parliament's concern for protecting the interests of depositors in the deposit-takers and the reason why it was expedient to give power to Bank Negara such an order as the one that was made.

The concluding paragraphs of the learned trial Judge's judgment state:

> As will be noted the emphasis is the protection of the depositors and their deposits with the deposit-takers. To be noted, too, is that in respect of para. 3 of the Order specific mention is made not of "liabilities" but of "deposit liabilities" of the deposit-takers and of "deposits" of the depositors in the deposit-takers and the intent is clear that the Order is to secure the interest of the depositors in regard to the corresponding deposit liabilities of these deposit-takers and this

is made clear in the mandatory language used in sub-para. (2) of the provision that the 2nd defendant "shall repay" the repayable deposits partly in cash and partly in shares, thus:

> 3(1) ...
>
> (2) In consideration of the advance of funds and the transfer of the properties, including deposits, and liabilities referred to in sub-para. (b) of the sub-para. (1), Kewangan Usahasama Makmur Bhd. **shall repay each of the depositor his repayable deposit partly in cash** (hereinafter referred to as "the cash portion") **and partly in shares** In Kewangan Usahasama Makmur Bhd. of one ringgit each (hereinafter referred to as "the share portion").

(Emphasis added)

Paragraph 4 of the Order, which is in issue, on the other hand is not concerned with deposit liabilities but with other liabilities and with the properties of the deposit-takers (including the lst defendant) and the language does not impose mandatory obligations. The language envisages that, non mandatory obligations in the matter specified in sub-paras. (a) to (i) could have been entered into contractually.

The words "subject to any agreement between the specified deposit-taker and Kewangan Usahasama Makmur Bhd., the following shall be deemed to be operative on the date of the coming into effect of this Order ..." can only have reference to agreements entered into before the coming into effect of the Order where the agreements did not specifically deal with any of the subject matters referred to in sub-paras. (a) to (i) (like properties - sub-para. (a), "deeds of assignment" or "order of Court" - sub-para. (b), "existing contracts' - sub-para. (c), etc. In those arguments where any of the relevant sub-paras. (a) to (i) relating to the subject matter has not dealt with then the appropriate provision of sub-paras. (a) to (i) will apply.

What has to be noted about the matters in the subparagraphs is that they apply only if there are no contractual provisions for them in the agreements made before 28.1.1988 and the legal device of using a deeming provision fills in the gaps of an agreement that has not dealt with the matters therein. But for the period after the effective date, parties were certainly aware or must be assumed to have been aware of the subject matters in the subparagraphs in para. 4 and could deal with them consensually in any way they liked. By the very nature of the subject matters dealt with in para. 4 not all of them would arise in all the agreements to be dealt with and it would be ridiculous to force parties to have such matters dealt with although not relevant. My view is that if the provisions of para. 4 of the Order had to be applied to all agreements made after the effective date the Order should have explicitly stated so. Thus, cl. 4.04 of the agreement between the lst defendant and the 2nd defendant excluding liabilities spelt out therein is valid.".

We have carefully considered the arguments canvassed by learned Counsel for both the parties, the relevant authorities, the construction of the order and the agreement, and the conclusion of the learned trial Judge with which we fully agree. We are unanimous in our view that the respondent cannot be held to be liable for the purported debt of the first defendant to the appellant. We had accordingly dismissed the appeal with costs and ordered the deposit to be paid to the respondent to account of their taxed costs.

Reported by W.A. Sharif